



Order 96-1-39

**UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.**

Issued by the Department of Transportation  
on the 26th day of January, 1996

Application of:

Gemini Air Cargo LLC

Docket OST-95-704

for a Disclaimer of Jurisdiction or, in the  
alternative, for an Exemption from 49  
U.S.C. Section 41101

**ORDER GRANTING EXEMPTION**

**Summary**

By this order, we are granting Gemini Air Cargo LLC (Gemini) an exemption as an indirect air carrier from the requirements of 49 U.S.C. Section 41101 to resell access to air transportation capacity procured from Sun Country Airlines, Inc., a U.S. certificated air carrier, to Swiss Air Transport Company, Ltd. (Swissair), a foreign air carrier.

**Background**

Under 49 U.S.C. Section 40102(a)(2), any person who engages, either directly or indirectly, in air transportation operations is deemed to be an air carrier. Under 49 U.S.C. Section 41101, an air carrier may provide air transportation operations only if it holds a certificate of public convenience and necessity or other authority granted by the Department. On October 5, 1995, Gemini filed an application seeking a disclaimer of the Department's jurisdiction or, in the alternative, an exemption from the requirements of 49 U.S.C. Section 41101 to the extent necessary to resell cargo air transportation to direct air carriers. Gemini stated that it was its intention to lease aircraft that it owns to one or more U.S. air carriers. Gemini thereafter would contract with those air carriers to acquire cargo aircraft space as an indirect cargo air

carrier and to resell that space to other airlines. No party filed an answer in response to Gemini's application.

In an effort to gain a more comprehensive understanding of the contractual arrangements proposed by Gemini, the Department orally requested that Gemini provide additional documents for review. The documents requested were filed on October 31, November 6, November 7, and December 18, 1995.<sup>1</sup>

## **Decision**

The Department has completed its review of the documents provided, and has determined that the arrangements proposed by Gemini do not fall within the blanket exemption provided by Section 296.10(a) of the Department's regulations (14 C.F.R. § 296.10(a)) applicable to indirect cargo air carriers. Furthermore, the Department declines to disclaim its jurisdiction over the transaction given the important and novel policy and legal issues that it presents.

In the alternative, Gemini requested that the Department grant it an exemption to the extent necessary to implement the contractual arrangements described in its application. Specifically, pursuant to our authority under 49 U.S.C. Section 40109, we have determined to grant Gemini an exemption as an indirect air carrier to allow it to contract to acquire cargo aircraft space from Sun Country and to resell that space to Swissair.

In the contractual arrangements that Gemini describes in its application, Gemini is engaging in a type of air carrier activity. It is acquiring access to cargo aircraft and crews from Sun Country and selling that access to Swissair and possibly other as-yet-unidentified air carriers. Although in some instances the air transportation may be resold in less than full planeloads, many contracts would involve the use of the whole aircraft. Rather than act as a broker for a transaction between the provider of the lift and the air carrier holding out the transportation to the public, Gemini would be in contractual privity with each carrier, and presumably assume the risk of loss for less than efficient utilization of the aircraft, as does an air carrier.

For these reasons, we have determined that Gemini is acting as a type of air carrier. In this case, we believe that it is in the public interest to grant Gemini an exemption as an indirect air carrier to allow it to acquire access to aircraft and crews from Sun Country and to resell the capacity to Swissair. This arrangement will enable Sun Country, through Gemini, to provide additional capacity for the operation of Swissair's scheduled cargo services. Insertion of Gemini between Sun Country and Swissair for the commercial benefit of the parties involved does not contravene any Departmental policies respecting safety or consumer protection insofar as Sun

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<sup>1</sup> The documents were filed under cover of a motion for confidential treatment, which we will grant.

Country remains in full operational control of the aircraft and Swissair is holding out the transportation to the shipping public.

The Department is not prepared, however, to grant an open ended exemption to Gemini to allow it to procure air transportation from any source and resell it to any air carrier or foreign air carrier. As a result, the exemption granted is limited to the transaction for which we have reviewed the underlying contractual documents. In the event that Gemini desires to procure air transportation from another air carrier or to resell the capacity it procures from Sun Country to a carrier other than Swissair, it will first be required to obtain approval from the Department. In the interest of not impeding commercial opportunities for Gemini, we are prepared to entertain requests for such approval on an expedited basis, without the necessity for a docketed proceeding. Applications should be filed with the Director, Office of International Aviation. By this order, we are assigning authority to the Director to act on these applications.

In our consideration of the exemption application, we have also reviewed Gemini's ownership structure, management, and financial structure. We have determined as a result of our review that Gemini's proposed operations do not give rise to any concerns regarding Gemini's ability to meet its obligations to the shipping public and that Gemini should be well able to meet its responsibilities as an indirect air carrier.

### **Decision on Rule 39 Motion**

Gemini filed a motion requesting that a number of documents submitted be accorded confidential treatment under 14 C.F.R. 302.39. These documents include: 1) the Aircraft Lease Agreement between Gemini and Sun Country, 2) the Services Agreement between Sun Country and Gemini, 3) the Agreement between Gemini and Swissair, and 4) an Agreement and Side Letter relating to aircraft maintenance. Gemini noted that these documents were required to be filed, however it argued that disclosure of these documents would unnecessarily infringe on its right to withhold this proprietary information.

Rule 39 instructs us to evaluate requests for confidential treatment in accordance with the standards of disclosure found in the Freedom of Information Act (5 U.S.C. Section 552). By this standard, information may be withheld from disclosure if it is "(1) commercial or financial, (2) obtained from a person outside the government, and (3) privileged or confidential."<sup>2</sup>

The information sought to be withheld from disclosure clearly meets the first two requirements. The only question therefore is whether the information is privileged

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<sup>2</sup> *Gulf & Western Industries, Inc. v. U.S.*, 615 F. 2d 527, 529 (D.C. Cir. 1979).

or confidential -- whether disclosure of the information is likely to have either of the following effects: 1) to impair the government's ability to obtain necessary information in the future; or 2) to cause substantial harm to the competitive position of the person from whom the information was obtained.<sup>3</sup> Furthermore, to be privileged or confidential, the information must not be of the type that is usually released to the public.<sup>4</sup>

We have reviewed the documents and find that their disclosure would cause substantial harm to the competitive position of Gemini and that they are not the type of documents that are normally released to the public. As such, they fall within the standards for withholding. Therefore, we have decided to grant the applicant's motion.

**Accordingly,**

1. We deny the application of Gemini Air Cargo LLC for a disclaimer of jurisdiction over the proposed transaction;
2. We grant to Gemini, for one year from the date of issuance of this order, an exemption from the requirements of 49 U.S.C. Section 41101 only to the extent necessary to act as an indirect air carrier to enable it to resell to Swissair air transportation procured from Sun Country Airlines;
3. We grant Gemini's motion for confidential treatment of documents submitted; and

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<sup>3</sup> *National Parks and Conservation Assoc. v. Morton*, 498 F. 2d 765, 770 (D.C. Cir. 1974).

<sup>4</sup> *Gulf & Western Industries, Inc. v. U.S.*, *supra*, at 530.

4. We assign to the Director, Office of International Aviation, X-40, the authority to act on requests by Gemini to expand the scope of its services with respect to capacity available from Sun Country to other foreign air carriers. Such requests should be filed no later than seven business days prior to the date on which Gemini seeks to begin such operations.

By:

MARK L. GERCHICK  
Acting Assistant Secretary for  
Aviation and International Affairs

(SEAL)

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